CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH-COURT NO. III

SERVICE TAX APPEAL NO. 50585 OF 2019

[Arising out of Order in Appeal No. 99-100/ST/DLH/2018 dated 31.05.2018 passed by the Commissioner (Appeals-I) Central Tax/GST, New Delhi]

M/S SPAIN ELECTRONOTICS **......APPELLANT**
6/270, Lalita Park, Laxmi Nagar,
Delhi-110 092

Vs.

COMMISSIONER(APPEALS-I) **......RESPONDENT**
Central Tax/GST, C R Building, New Delhi-2

Appearance:

Ms. Vandana Singh, Advocates for the Appellant

Shri Anand Narayan, Authorised Representative for the Respondent

CORAM:
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Final Order No. 50388 /2025

Date of Hearing : 07/01/2025
Date of Decision : 10/03/2025

P.V. SUBBA RAO

1. M/s Spain Electronotics Limited[1] filed this appeal to assail the Order in Appeal dated 31.05.2018[2] passed by the Commissioner (Appeals), Central Excise and CGST, New Delhi whereby he upheld the order in original dated 20.06.2017 passed by the Additional Commissioner and rejected the appeal filed by the appellant. The order in original decided the proposals made

---

1 The appellant
2 Impugned order

in two show causes notice dated 05.07.2013 and 15.09.2015 and a statement of demand dated 04.04.2016, the details of which are as follows:

Sr. No.	SCN	Period	Amount of service tax	Head
1	05.07.2013	2008-09	62,01,346/-	Supply of tangible goods service
2	15.09.2015	2013-14	5,78,816/-	Works contract service
3	04.04.2016	2014-15	7,13,828/-	Works contract service

2. The appellant is registered with the service tax department for providing "erection, commissioning and installation services" as defined under section 65 (105) (zzd) of the Finance Act, 1994[3]. The appellant was investigated by the anti-evasion wing of the service tax commissionerate and it came to the conclusion that the appellant had also rendered the service of "supply of tangible goods" service chargeable to service tax under section 65 (105)(zzzzj). It was found that the appellant had supplied 1000 KVA DG sets to Panipath-Jalandhar LPG pipeline which activity appeared to be chargeable to service tax under section 65 (105)(zzzzj). Accordingly, a show cause notice dated 05.07.2013 was issued[4].

3. Another SCN dated 15.09.2015 issued as it was found that the appellant had sold DG sets to its customers and also erected, commissioned and installed them. It was felt that such contracts were composite contracts including the sale of the DG sets and rendering services of erection commissioning and installation

3 The Finance Act
4 SCN

which were, therefore, classifiable as a "works contract" on which service tax needs to be paid.

4. The statement of demand dated 04.04.2016 was issued on the aforesaid demand under the head of "works contract service" but computed considering an average growth of 25% of the appellant's service tax liability. The appellant had not submitted any reply to the Show Cause Notices dated 05.07.2013 and 09.04.2016 but submitted a reply to the show cause notice dated 27.11.2015. Personal hearing was fixed on several dates but the appellant had not appeared. Thereafter the Additional Commissioner passed the order-in-original which, on appeal, was upheld in the impugned order by the Commissioner(Appeals).

Submissions of behalf of the appellant

5. Learned counsel for the appellant made the following submissions:

(i) The first show cause notice dated 04.07.2013 is on the DG sets which the appellant had supplied to Indian Oil Corporation Limited on its Panipath-Jalandhar Pipelines.

(ii) The department's contention that such supply of DG sets amounted to supply of tangible goods service under section 65 (105)(zzzzj) of the Finance Act is not correct because under this clause only services provided "to any person by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, **without transferring right of possession and effective control of such machinery** equipment and appliances" can be charged.

(iii) If the right of possession and effective control is transferred to the client then the supply of DG sets qualifies as deemed sales under article 366(29A) of the Constitution of India. Therefore, they will be chargeable to VAT/sales tax by the State Government and will not be chargeable to service tax under supply of tangible goods service.

(iv) So the key issue to be decided is whether the effective possession and control over the DG sets which were supplied by the appellant have been transferred to its client IOCL or otherwise.

(v) On this question the Supreme Court in the case of **Bharat Sanchar Nigam** vs. **Union of India**[5] laid down five criteria and if all these five are fulfilled the supply amounts to deemed sale by transferring effective possession and control. These are as follows:

a. There must be goods available for delivery
b. There must be consensus ad idem as to the identity of the goods;
c. The transferee should have a legal right to use the goods consequently all legal consequences of such use including any

---

5 2006(2)STR 161 (SC)

permissions or licenses required therefore should be available to the transferee;
d. For the period during which the transferee has such legal right it has to be the exclusion to the transferee this is the necessary concomitant of the plain language of the statute-viz, a " transfer of the right to use" and not merely a licence to use the goods;
e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

(vi) The first condition is that there must be goods for delivery and the fulfillment of this condition is not in dispute because the appellant had supplied DG sets to its customers by M/s IOCL;

(vii) The second condition is that there must be a consensus ad idem as to the identity of the goods. In their case the DG sets were installed and there was no dispute or confusion about which DG sets were being leased out. Therefore, the second condition was also fulfilled.

(viii) The third condition is that transferee should have a legal right to use the goods and consequently all permissions or licenses required should be available to the transferee. The appellants had supplied DG sets and were obliged to run them atleast 250 hours per month. This duration could not be modified by the appellant. Not only the DG sets but also the fitness certificates and other equipments required for their operation were available to IOCL at all times to the exclusion of any other patty or even the appellant. Therefore, this condition was also fulfilled.

(ix) The fourth condition to be fulfilled is that the legal right of the transferee has to be the exclusion of the transferor. Therefore, there must be an effective transfer of right to use and not merely a licence to use the goods. In this case, the DG sets were given to the transferee M/s IOCL and neither the appellant nor anybody else could have used them for any other purpose during the period of lease.

(x) The fifth condition is that during the period for which right of use of goods is transferred, the owner cannot again transfer the same right to the others. In this case, this condition is also fulfilled because the appellant, as the owner of the DG sets, could not have transferred them to any other person during the period of contract. Therefore, the entire demand under this head was made contrary to the law.

(xi) So far as the demand of service tax under head Works contract service in the show cause notice dated 15.09.2015 is concerned, during the relevant period the appellant had sold DG sets to its buyers. As a part of the condition of such sale, the appellant had also installed and commissioned the DG sets. The appellant did not charge any amount towards erection or commissioning of the DG sets. What was done was essentially sale of DG sets and their installation at the buyers' premises. The Department had wrongly taken this contract for sale of goods as a "works contract service". Merely because some incidental service such as installation and commissioning were also taken up by the appellant, it does not automatically mean that the appellant had rendered "works contract services".

(xii) The statement of demand dated 04.04.2016, under the works contract service without any evidence to show that the appellant had rendered any works contract service. The statement of demand has been made assuming 25% growth in the value of the taxable services provided over the previous year. This demand, therefore, cannot be sustained and needs to be set aside.

(xiii) Since the demand is not sustainable the interest and penalties also cannot be sustained and, therefore, they need to be set aside.

Submissions on behalf of the Revenue

6. Learned authorized representative appearing for the department reiterated the discussion and findings in the order-in-original and order-in-appeal.

7. We have considered the submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department and perused the records.

8. The demand of service tax in the two show cause notices and the statement of demand are based on the DG sets supplied on lease by the appellant to IOCL and the DG sets sold by the appellant to its customers.

9. With respect to the DG sets which were supplied and leased by the appellant, the demand is made in the first show cause notice under the head "supply of tangible goods services". In the contract under which DG sets were sold by the appellant, the contract of sale also required the appellant to install and commission the DG sets. The department's case is that since the appellant sold these DG sets and also installed them it had provided a works contract service and, therefore, appropriate service tax has to be paid. The case of the appellant is that it had only sold DG sets and as a part of its obligations in the sale it also installed and commissioned them. It did not charge any amount whatsoever towards the installation and commissioning. Therefore, no service tax can be charged. The demand in the statement of demand is by projection consideration of 25% growth provision of "Works contract service" by the appellant.

Supply of Tangible Goods Service

10. The Constitution of India divides the legislative and executive functions between the Union and States through the Seventh Schedule. It has three lists. List-1-Union List, List-2-State List, List-3 Concurrent List. Insofar as the taxation is concerned, List-1 and List-2 are mutually exclusive. In other words any tax can be levied as per the entry in List-1, it cannot also be levied through an entry in List-2 and vice versa.

11. The power to levy taxes on the sale and purchase of goods is that Sr. No. 54 of list-2 only State legislatures can levy tax on sale and purchase of goods.

12. The Supreme Court had held in the case of **State of Madras** vs. **Ganon Dunkerly & Company Limited**[6] that the State Government's had no power to levy sales tax on deemed sales considering the value of the goods used in works contract. Thereafter, the Constitution of India was amended and a new clause (29A) was inserted in Article 366(definition clause of the Constitution). This clause 29A enlarged the scope of expression "sale and purchase of goods" to include goods used in works contract service and also goods which are supplied on lease giving effective possession and control to the transferee. Article 366 (29A) reads as follows:

> **"Article 366(29A) in Constitution of India**
>
> "(29A)"tax on the sale or purchase of goods" includes—
>
> (a)a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

---

6 2015 (30) ELT 11(SC) decided on 01.04.1958

(b)a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c)a tax on the delivery of goods on hire-purchase or any system of payment by installments;

(d)a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e)a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f)a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

13. Thereafter, in 1994 the Central Government, in exercise of the powers under entry 97 (residual entry) of list-1, imposed service tax. The service tax could be imposed under this entry only on such activities which did not fall under the State list. Since the supply of tangible goods by giving effective possession and control is deemed to be a sale as per Article 366 (29A), all such transfers are chargeable to sales tax/ VAT by the State Government.

14. However, where the goods are leased without giving effective possession and control of the goods to the transferee, it was covered under the service tax under section 65 (105)(zzzzd). Thus, there are two types of lease contracts-where the effective possession and control is given to the transferee and VAT/ sales

tax is payable and where there is no effective possession and control to the transferee and service tax is chargeable.

15. The question which arose before the Supreme Court in **Bharat Sanchar Nigam Limited** is what constitutes effective possession and control over the goods. The Supreme Court has laid down five criteria and if these are fulfilled the effective possession and control would have been transferred to the transferee and VAT can be charged. Otherwise, service tax can be charged under section 65(105)(zzzzd).

16. The first condition is that there must be goods available for delivery. In this case there is no dispute that the DG sets which the appellant had supplied were available for supply and were actually delivered as well to M/s IOCL.

17. The second condition is that they must be a consensus ad idem as to the identity of the goods. There is no dispute that the DG sets which were transferred were identified and there was no dispute between the parties on this question. Therefore, the second condition was also fulfilled.

18. The third condition is that the transferee should have a legal right to use and consequently all legal consequences of such use including permissions should be available to the transferee. As per the agreement the appellant was supposed to run the DG sets for 250 hours per month as per the directions of IOCL and during the operational the fitness certificate and other operations

were available to the IOCL and, therefore, third condition is also fulfilled.

19. The fourth condition is that for the period during which the case were transferred the transferee has a legal right to the exclusion of the transferor to use the DG sets. During the period the appellant had transferred the DG set to IOCL, the appellant had no right to use them as well. Therefore, the IOCL enjoyed the legal right to use them for the period of lease.

20. The last requirement is that the goods having been transferred the transferor should have no right to transfer them to somebody as well. It is evident from the agreement that the appellant had no right to transfer the same goods to others as well. The DG sets once installed for a period by the appellant will be under the exclusive control and meant for the exclusive use of IOCL.

21. In view of the above, we find that only VAT could have been charged by the State Government on the DG sets supplied by the appellant to IOCL. No service tax under section 65 (105)(zzzzd) could have been charged. Therefore, the demand in the first show cause notice cannot be sustained and needs to be set aside.

22. As far as the second show cause notice is concerned, the appellant had sold DG sets and the sale had a condition of sale the appellant also had to install and commission them. No separate amount was charged by the appellant in installation or

commission. The case of the department is that since the appellant had not only sold the DG sets but also installed and commissioned them, the nature of the contract is of works contract involving transfer of goods and provisions of service as well.

23. On the other hand according to the appellant it had only sold the DG sets had not rendered any service. It had, however, installed and commissioned them free of cost, therefore, there was no element of service.

24. We have examined the submissions on both sides on this question and find that the pre-dominant nature of the contract is that of sale of DG set. When a large equipment such as DG set is purchased, the customer naturally wants the seller to install and commission it so to necessary to ensure that the DG sets were in working order. Merely because the goods were installed and commissioned after sale, the contract would not become a works contract services. It is more or less like a refrigerator or air-conditioner bought by someone for home use. The seller sells the refrigerator and also delivers and installs which satisfies the buyer that it is in good working condition. Therefore, the demand of service tax on the sale of generators by treating them as "works contracts" merely because the generators were also installed and commissioned by the appellant cannot be sustained and is liable to be set aside.

25. The third statement of demand is also on works contract service on the same pattern as above but based on the presumption of 25% growth. Since we found that in favour of the assessee and against the Revenue on the demand of service tax on the DG sets sold, this demand also needs to be set aside.

26. In view the above, the demand of service tax and interest in the impugned order is set aside consequently the penalties imposed are also set aside.

27. The impugned order is set aside and the appeal is allowed with consequential relief, if any, to the appellant.

[Order pronounced on **10/03/2025**]

(BINU TAMTA)
MEMBER (JUDICIAL)

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

Tejo